

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 3762 of 2006

Shrimant Shahu Shahaji
Chhatrapati Maharaj ..Petitioner

vs.

1. Rajwardhan Raghuji Rao
Kadambade and others ...Respondents

Shri G.S.Godbole for petitioner
Shri S.M.Gorwadkar for respondents.

**CORAM: S.C.DHARMADHIKARI J.
27th NOVEMBER, 2007**

P.C.

1. The present petitioner is the original defendant. He has filed Civil Revision Application in this Court challenging the impugned order. However, after amendment to the Code of Civil Procedure, revision is held to be not maintainable and that is how the instant petition under Article 227 of the Constitution is filed.

2. I brought it to the notice of Shri Godbole appearing for the petitioner that the impugned order has been delivered on the application made by the respondents/original applicants (Exh.27) on 19th August, 2003. Assuming that the plaint

is amended, I enquired of Shri Godbole as to how now considering the legality and validity of this order would assist the parties, more so, when the suit is of 1989.

3. Shri Godwadkar in all fairness states that despite observations of the Court below on the instant application, if the issue of maintainability of the suit at the instance of the applicants who have been impleaded as party plaintiffs can still be kept open and appropriate clarification issued, he would have no objection to proceed with the special civil suit. Similarly, Shri Godbole states that the present petitioner is defendant to the suit. Upon death of the sole plaintiff and it being held that the applicants cannot step in, the suit must necessarily abate. Therefore, once the impugned order is delivered, plaint amended, it should not be concluded finally that there is no abatement.

4. Shri Gorwadkar on the other hand states that proceedings before the Court below were summary in nature and all findings are tentative and prima facie. They cannot be said to be

concluding the issues including the maintainability of the suit.

5. Having perused the impugned order and application upon which the same has been passed, I am of the view that the issue of maintainability of the suit should be framed by the Trial Court and while trying the said issue, the Trial Court may consider taking it first before all other issues and render upon it the finding uninfluenced by the observations in the impugned order so also giving opportunity to both sides to place such material as is permissible in law and raise appropriate pleas in support thereof. In my view, the issue as to whether the provisions of Hindu Succession Act, 1956 would govern the proceedings or whether the predecessor in title of parties having expired in the year 1940 i.e. prior to Hindu Succession Act coming into force, the old Hindu Law and more particularly the provisions prevailing in Kolhapur division would govern the proceedings is something which must be decided by the Court below and while deciding the said issue it should not be influenced by any observations including those in paras 8 to 10 of the impugned order.

6. In the light of this, the petition is disposed of by directing the Trial Court to frame the issue of maintainability of the suit so also whether the proceedings abate upon the death of the sole plaintiff and render upon it the findings uninfluenced by any of the observations in the impugned order so also that of this Court. Keeping all contentions of both sides open the Trial Court should decide the issue. Petition is accordingly disposed of.

(S.C.DHARMADHIKARI J.)